Office-Supreme Court, U.S.
FILED
FEB 2 1981
ALEXANDER L. STEVAS,
CLERK

80-1304

No. 80-***

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PAGE AIRWAYS, INC., *et al.*,
Petitioners,

v.

ASSOCIATED RADIO SERVICE CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DONALD F. TURNER
RONALD J. GREENE
SUSAN LOW BLOCH
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Attorneys for Page Airways, Inc. and Page Gulfstream, Inc.

JAY M. VOGELSON
One Dallas Center, Suite 2400
Dallas, Texas 75201

Attorney for Douglas Juston

D. L. CASE
JACK PEW, JR.
4300 First National Bank Bldg.
Dallas, Texas 75202

Attorneys for Ross C. Chapin

Of Counsel:

AKIN, GUMP, HAUER & FELD
2800 Republic National
Bank Bldg.
Dallas, Texas 75201

February 2, 1981

QUESTIONS PRESENTED FOR REVIEW

1. Whether the unelaborated market definition criteria set forth in *Brown Shoe Co.* v. *United States* adequately instruct a jury (or a trial judge) on how to find a relevant market.
2. Whether treble damages under the antitrust laws can be awarded for business torts that have merely a potential effect on competition, or whether actual injury to competition must be shown.
3. Whether an appellate court can affirm a jury verdict when it cannot determine whether or not the jury relied on a correct rule of law.[1]

---

[1] The following were parties to the proceeding in the Court of Appeals: Page Airways, Inc., Page Gulfstream, Inc., Douglas Juston, Ross C. Chapin, Edwin C. Hamilton, Associated Radio Service Company, and Associated Radio Company.

Except for the parties listed above, there are no additional parent corporations, partially owned subsidiaries, or affiliates of Page Airways, Inc. or its wholly owned subsidiary Page Gulfstream, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	(i)
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION OF THIS COURT	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
(1) Statement of Facts	3
(2) District Court Proceedings	5
(3) The Court of Appeals Decision	7
REASONS FOR GRANTING THE WRIT	9
I. THE CASE INVOLVES FUNDAMENTAL ERRORS IN THE APPROACH TO MARKET DEFINITION THAT HAVE BEEN WIDESPREAD AND REQUIRE CORRECTION BY THIS COURT	9
A. The Jury Instructions in This Case, Which Did Little More Than Track the Language in *Brown Shoe Co.* v. *United States*, Were Insufficient and Misleading	13
B. The Issues Raised Are Important and Should Be Resolved by This Court	18
II. THE FIFTH CIRCUIT HAS ADOPTED A UNIQUE TEST FOR DETERMINING WHEN ACTS OF UNFAIR COMPETITION VIOLATE THE ANTITRUST LAWS—A TEST THAT CONFLICTS WITH THE TESTS PREVAILING IN OTHER CIRCUITS AND THAT SHOULD BE REJECTED BEFORE MORE BUSINESS RIVALS ARE ENCOURAGED TO SEEK TREBLE DAMAGES FOR ORDINARY BUSINESS TORTS	19

PRECEDING PAGE WAS BLANK

TABLE OF CONTENTS—Continued

Page

III. THE COURT, IF IT GRANTS THIS PETITION, SHOULD ALSO CORRECT THE PLAIN ERROR COMMITTED BY THE COURT BELOW IN UPHOLDING THE VERDICT OF LIABILITY UNDER SECTION 2 OF THE SHERMAN ACT 27

CONCLUSION 29

TABLE OF AUTHORITIES

CASES Page

Agrashell, Inc. v. *Hammons Products Co.*, 479 F.2d 269 (8th Cir.), *cert. denied*, 414 U.S. 1032 (1973) 10

Albert Pick-Barth Co. v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932) 20

Apex Hosiery Co. v. *Leader*, 310 U.S. 469 (1940) .. 20

Atlantic Heel Co. v. *Allied Heel Co.*, 284 F.2d 879 (1st Cir. 1960) 20

Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962) ..... *passim*

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) 26

Budd Co., In re, 86 F.T.C. 518 (1975) 13

C. Albert Sauter Co. v. *Richard S. Sauter Co.*, 368 F. Supp. 501 (E.D. Pa. 1973) 20

Calnetics Corp. v. *Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976) 13

Continental T.V., Inc. v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) 18, 21

Craig v. *Sun Oil Co.*, 515 F.2d 221 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 (1976) 22, 23

Franklin Music Co. v. *ABC, Inc.*, 616 F.2d 528 (3d Cir. 1979) 21, 23

Frederick Chusid & Co. v. *Marshall Leeman & Co.*, 326 F. Supp. 1043 (S.D.N.Y. 1971) 22

George R. Whitten, Jr., Inc. v. *Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975) 22, 23

Gough v. *Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979) 21

Havoco of America, Ltd. v. *Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980) 21

Hunt v. *Crumboch*, 325 U.S. 821 (1945) 20

TABLE OF AUTHORITIES—Continued

Page

Juneau Square Corp. v. *First Wisconsin National Bank of Milwaukee*, 624 F.2d 798 (7th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3409 (Dec. 1, 1980) (No. 80-517) 21, 23

Kaplan v. *Burroughs Corp.*, 611 F.2d 286 (9th Cir. 1979) 21, 23

Maryland v. *Baldwin*, 112 U.S. 490 (1884) 16, 28

Metal Lubricants Co. v. *Engineered Lubricants Co.*, 411 F.2d 426 (8th Cir. 1969) 20

Mr. Hanger, Inc. v. *Rizzuto*, 410 F.Supp. 1158 (S.D.N.Y. 1975) 20, 22

Northwest Power Products, Inc. v. *Omark Industries, Inc.*, 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979) 21, 24

Perryton Wholesale, Inc. v. *Pioneer Distributing Co.*, 353 F.2d 618 (10th Cir. 1965), *cert. denied*, 383 U.S. 945 (1966) 20

Photovest Corp. v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) 10

Sears, Roebuck & Co. v. *Stiffel Co.*, 376 U.S. 225 (1964) 21

Standard Oil Co. v. *United States*, 337 U.S. 293 (1949) 26

Stifel, Nicolaus & Co. v. *Dain, Kalman & Quail Inc.*, 578 F.2d 1256 (8th Cir. 1978) 21

Sunkist Growers, Inc. v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962) 16, 28

Telex Corp. v. *IBM Corp.*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975) 13

Tower Tire and Auto Center, Inc. v. *Atlantic Richfield Co.*, 392 F.Supp. 1098 (S.D. Tex. 1975) 20

Twin City Sportservice, Inc. v. *Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975) 13

United States v. *Blue Bell, Inc.*, 395 F.Supp. 538 (M.D. Tenn. 1975) 10

United States v. *Columbia Steel Co.*, 334 U.S. 495 (1948) 13

TABLE OF AUTHORITIES—Continued

Page

United States v. *Von's Grocery Co.*, 384 U.S. 270 (1966) 25

Vogue Instrument Corp. v. *Lem Instruments Corp.*, 40 F.R.D. 497 (S.D.N.Y. 1966) 22

STATUTES

Clayton Act

Section 4, 15 U.S.C. § 15 (1976) 3

Sherman Act

Section 1, 15 U.S.C. § 1 (1976) ..... *passim*

Section 2, 15 U.S.C. § 2 (1976) ..... *passim*

MISCELLANEOUS

ABA ANTITRUST SECTION, ANTITRUST CIVIL JURY INSTRUCTIONS (1980) 11

P. AREEDA & D. TURNER, ANTITRUST LAW (1978) .. 13, 22

Boone, *Single-Corporation Competitive Torts and the Sherman Act*, 2 GA. L. REV. 372 (1968) 22

Handler, *Twenty-Five Years of Antitrust*, 73 COLUM. L. REV. 415 (1973) 9

Hutter, *"Dirty Tricks" and Section One of the Sherman Act: Federalizing State Unfair Competition Law*, 18 B.C. INDUS. AND COM. L. REV. 239 (1977) 22

Note, *Antitrust Treatment of Competitive Torts: An Argument for a Rule of Per Se Legality Under the Sherman Act*, 58 TEX. L. REV. 415 (1980) 22

Note, *The Role of Supply Substitutability in Defining the Relevant Product Market*, 65 VA. L. REV. 129 (1979) 9

Note, *Unfair Competition Under the Sherman Act*, 59 IOWA L. REV. 1194 (1974) 22

Note, 42 FORD. L. REV. 909 (1974) 22

R. POSNER, ANTITRUST LAW (1976) 9, 13, 17

Yoerg, *Should a Trade Secrets Misappropriation Claim Lie in the Procrustean Antitrust Bed?*, 22 ANTITRUST BULL. 1 (1977) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-***

PAGE AIRWAYS, INC., *et al.*,
Petitioners,

v.

ASSOCIATED RADIO SERVICE CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Page Airways, Inc., Page Gulfstream, Inc., Douglas Juston and Ross C. Chapin respectfully petition for a Writ of Certiorari to issue to the United States Court of Appeals for the Fifth Circuit to review that Court's Judgment and Opinion in *Associated Radio Service Co.* v. *Page Airways, Inc.*, No. 78-1179, entered on August 29, 1980.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit appears in Appendix A of this petition and is reported at 624 F.2d 1342 and 1980-2 Trade Cases ¶ 63,512. The Memorandum Opinion and Judgment of the United States District Court for the Northern District of Texas, denying Petitioners' motion for judg-

ment notwithstanding the verdict with respect to Respondent Associated Radio Service Co. and entering judgment for Respondent for $9,048,210.00, appears in Appendix B of the petition but is not officially reported.[2] The Judgment of the Court of Appeals appears in Appendix C and the Order of the Court of Appeals denying Petitioners' Petition for Rehearing and Suggestion for Rehearing *en banc* appears in Appendix D.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the Court of Appeals for the Fifth Circuit was entered on August 29, 1980. The timely Petition for Rehearing and Suggestion for Rehearing *en banc* were denied on November 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), reads in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976), reads in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, . . ."

---

[2] Two earlier rulings on procedural matters in this case are reported at 414 F. Supp. 1088 (N.D. Tex. 1976), 1976-2 Trade Cases ¶ 60,971 and at 73 F.R.D. 633 (N.D. Tex. 1977), 1977-2 Trade Cases ¶ 61,742.

Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), reads:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

The $9 million judgment in this private antitrust case rests on jury instructions reflecting long-standing deficiencies in the approach to market definition, and on a uniquely inadequate test of competitive injury which converts the Sherman Act into a generalized treble-damage remedy for ordinary business torts.

(1) Statement of Facts

This dispute arose out of the termination of a business venture in which Petitioners Page Airways, Inc., its wholly owned subsidiary Page Gulfstream, Inc. (hereinafter collectively referred to as "Page") and Respondent Associated Radio Service Co. (hereinafter "Associated") outfitted private and business aircraft at a facility in San Antonio, Texas.

The business of outfitting aircraft consists of installing flight equipment ("avionics") and interiors in aircraft to make them suitable for use by their owners.[3] Outfitters work on commercial aircraft that are being con-

---

[3] Avionics outfitting involves the installation of the electronic equipment, including flight control, navigation, and communication subsystems, in the aircraft. Installation of interiors includes the design and installation of the seats, carpeting, and other items in the aircraft cabin.

verted to private use, as well as on "green"[4] aircraft delivered new from the factory. Today some twenty major outfitters in this country and a few in Europe outfit a variety of private aircraft. *Associated Radio Service Co.* v. *Page Airways, Inc.*, 624 F.2d at 1344-45; App. A at 2a.

Respondent Associated has been in the aircraft outfitting business under various names and with assorted business associates since 1948. In 1968, Associated opened its own complete aircraft outfitting facility in Dallas, Texas, which it continues to operate today, installing both avionics and interiors in various aircraft. 624 F.2d at 1345; App. A at 3a.

In 1967, Petitioner Page was asked by Grumman Corporation to become a distributor of the Grumman Gulfstream II (G-II) and to establish an outfitting facility in the southwest part of the country. Page thereupon entered a five-year agreement with Associated, taking effect in 1968, under which Page would contract to sell outfitted G-II's to business customers and Associated, as a subcontractor, would install the avionics equipment specified by the customers. The work would be performed in an outfitting facility in San Antonio, Texas. Interior installation, originally to be performed by a third party, was soon taken over by a new enterprise jointly operated by Page and Associated. *Id.* at 1345-46; App. A at 4a.

By June 1972, Page notified Associated of its intention not to renew the agreement when it expired in June 1973—a decision that was admittedly lawful—and began plans to establish its own outfitting facility. *Id.* at 1347; App. A at 6a. Disputes between the parties arose as the joint operation in San Antonio was being shut down.[5]

---

[4] Green aircraft are those new planes which are sold to customers without completed avionics and interior furnishing.

[5] Associated continued to operate its Dallas facility, installing both avionics and interiors in a variety of aircraft, including some G-II's. *Id.* at 1345-47; App. A at 8a.

Finally, Associated brought this antitrust damage action. *Id.* at 1348; App. A at 8a.

(2) District Court Proceedings

Respondent Associated originally filed its complaint in this case in October, 1973, in the United States District Court for the Northern District of Texas. After an initial amendment, the complaint was dismissed with leave to amend. On June 25, 1975, Associated filed a second complaint, charging that Page Airways, Inc., its wholly owned subsidiary Page Gulfstream, Inc., and several employees of Associated and Page had conspired to eliminate Respondent as a competitor in the installation of avionics in the Grumman G-II's and had thereby violated Sections 1 and 2 of the Sherman Act. The Defendants were alleged to have "pirated" Associated's employees, stolen trade secrets, slandered Associated's credit, brought false lawsuits, engaged in commercial bribery, and used income tax evasion to strengthen Page's competitive position.[6] *Id.* at 1347-48; App. A at 8a-9a.

A jury trial commenced on June 6, 1977, continued for 11 weeks, and involved some 50 witnesses, 600 exhibits, and 9,000 pages of testimony. The evidence proffered by Associated related largely to Petitioners' alleged bad acts.[7] Associated offered no testimony from customers

---

[6] Filing the suit with Associated was its principal supplier of avionics equipment, Associated Radio Company. The District Court found that the supplier had no standing to sue Petitioners and entered judgment notwithstanding the verdict. App. B at 42a-43a. The Court of Appeals affirmed. 624 F.2d at 1362-63; App. A at 39a-40a. Petitioners of course are not seeking to review that judgment.

[7] Petitioners had unsuccessfully sought to protect themselves from the introduction of prejudicial and irrelevant evidence by moving to dismiss or exclude inflammatory allegations and testimony. These motions related, *inter alia*, to Petitioners' alleged

or suppliers in the aircraft outfitting business (other than Associated itself), nor from experts who had studied the business. Petitioners unsuccessfully moved for a directed verdict on the grounds, *inter alia*, that the evidence dictated a broader market definition than the narrow definition proposed by Respondent, that Respondent had shown at most injury to itself but had shown no injury to competition, and that the evidence was insufficient to prove that Petitioners attempted to monopolize or actually monopolized any relevant market, regardless of how narrowly defined. *Id.* at 1348, 1350, 1354; App. A at 10a, 12a-13a, 21a; CA App. at 2362-2382, 2538-2557.

Both before and after the close of trial, Petitioners proposed jury instructions that attempted to relate the facts of the case to the market definition issue. CA App. at 2391-93, 2518-27. The District Court, however, concluded that the effort "to relate the facts to the law in this case [had] resulted in either confusion or unfairness," CA App. at 2582, and abandoned the effort. Its instructions to the jury on the critical issue of market definition were little more than an abstract statement of criteria listed in this Court's decision in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962). 624 F.2d at 1349-50, n.12; App. A at 11a-12a.

Petitioners also proposed special interrogatories directing the jury to determine whether each of the alleged acts of unfair competition actually had occurred and, if so, whether it had had an adverse effect on competition. CA App. at 2472-94. The District Court, however, rejected the interrogatories and charged the jury that each of the alleged bad acts, if found, was evidence in support of the antitrust claims, that it need not find a specific injury, and that it had to find only that the conduct tended to restrict competition or to prejudice the public

---

bribery of foreign officials, their alleged misuse of judicial process, and their alleged failure to pay income tax. *See* Joint Appendix in Court of Appeals (hereinafter "CA App.") at 2274 and 2304.

interest. 624 F.2d at 1353, n.20 and 1358, n.27; App. A at 20a and 31a.

After brief deliberation, the jury returned a verdict in favor of Respondent. It found that the relevant market was the sale and installation of avionics equipment in Grumman G-II's only, that Petitioners had combined, conspired, or agreed to restrain trade unreasonably in violation of Section 1, and that Petitioners had monopolized, attempted to monopolize, or conspired to monopolize the installation of avionics equipment in Grumman G-II's. It awarded $2,750,000 in damages to Associated Radio Service Company and $550,000 to Associated Radio Company. 624 F.2d at 1348; App. A at 9a.

The trial judge, in his Memorandum Order and Judgment of October 7, 1977, denied Petitioners' motion for judgment notwithstanding the verdict with respect to Respondent Associated Radio Service Company and awarded treble damages of $8,250,000.00, attorneys' fees of $757,424.00, and expenses of $40,876.00. App. B at 43a-46a, 48a. The judge found that Associated Radio Company, the supplier of Associated, had no standing to sue Petitioners for lost business and entered a judgment for Petitioners notwithstanding the jury verdict for the supplier. App. B at 42a-43a. Petitioners' motion for a new trial was denied on November 21, 1977. CA App. at 2622, 2675.

(3) The Court of Appeals Decision

The Court of Appeals for the Fifth Circuit affirmed the judgment against Petitioners. The Court found sufficient evidence to support the jury's narrow market definition. It also held that the jury charge on the market definition issue was "clear" despite the fact that it simply repeated a list of potentially relevant factors, without explanation and without indicating the significance of the conflicting positions of the parties with respect to outfitters' ability to move from one aircraft model to another. 624 F.2d at 1348-50; App. A at 9a-12a.

Turning to the Section 1 violation, the Court set forth a new two-part test for determining when acts of unfair competition and other business torts violate Section 1 of the Sherman Act. Neither part of its test requires a showing of actual competitive injury; instead, the test allows a jury to find liability if the plaintiff succeeds in showing "(1) a market effect that would be prohibited under the law of mergers; and (2) other conduct by defendant that threatens Sherman Act values." *Id.* at 1351; App. A at 16a. Applying the newly announced test, the Court concluded that the jury instructions, requiring only that the defendant's conduct have a tendency to injure competition or to prejudice the public interest, were "adequate," and that there was enough evidence to satisfy the test in this case. *Id.* at 1351-53; App. A at 16a-20a.

Finally, the Court upheld the jury's finding of a Section 2 violation. It found that Page's share of the supposed G-II avionics market was significant enough to support a Section 2 charge and that the collection of alleged bad acts was sufficient to show a "pattern of exclusionary behavior" in violation of Section 2. *Id.* at 1353-57; App. A at 21a-30a.[8]

---

[8] Because the Court held that *"all* of this conduct, taken together, rose to the level of a section 2 violation and . . . isolated acts, standing alone, did not," and because Hamilton, one of the defendants, had been accused of engaging in only a few of the bad acts, the Court of Appeals reversed the judgment against Hamilton. 624 F.2d at 1363; App. A at 40a-41a (emphasis in original).

Petitioners had also challenged the substantial $9 million damage award on a number of grounds, including the fact that the jury was never told to distinguish between Associated's losses arising from the lawful termination of the subcontract relationship and those arising from the alleged tortious acts. The Court of Appeals nevertheless accepted the damage figure on the assumption that, since the jury was aware of the termination of the subcontract relationship, it must have considered it and must have decided that, despite the termination and new competition from Page, Associated would have gotten the same share of G-II outfitting contracts that it previously had gotten through Page. *Id.* at 1361-62; App. A at 38a-39a.

REASONS FOR GRANTING THE WRIT

I. THE CASE INVOLVES FUNDAMENTAL ERRORS IN THE APPROACH TO MARKET DEFINITION THAT HAVE BEEN WIDESPREAD AND REQUIRE CORRECTION BY THIS COURT

Market definition is critical if not decisive in a wide range of antitrust cases, including all merger cases and all Sherman Act cases in which market power or actual injury to competition must be shown. It is therefore vitally important to a rational disposition of such cases that markets be defined as accurately and sensibly as economic analysis and practical constraints permit.

While in many cases the factual issues are complex and ultimate resolution difficult, the basic elements of a correct approach to market definition are not obscure. Yet they are widely misperceived or disregarded. Market definition, both in jury and non-jury cases, has been one of the least satisfactory and most severely criticized areas of antitrust law.[9] In many cases,

---

[9] As Professor Handler has observed:

> "The threshold inquiry in any merger or monopoly case is the delineation of the relevant market. If the market is incorrectly defined, we can anticipate that the result will usually be likewise erroneous. The error can stem either from a market determination that is too broad or one that is to narrow. Unfortunately, market delineation from the very outset of section 7 litigation has degenerated into a game. The process of gerrymandering does no credit either to bench or bar."

Handler, "Twenty-Five Years of Antitrust," 73 COLUM. L. REV. 415, 453 (1973).

To similar effect is Professor Posner's opinion that "[m]arket definition is . . . conceptually straightforward, but it has been badly handled by the courts." R. POSNER, ANTITRUST LAW 127 (1976).

See also Note, "The Role of Supply Substitutability in Defining the Relevant Product Market," 65 VA. L. REV. 129, 130 (1979):

market definitions have bordered on the ludicrous—occasionally overly broad, more commonly overly narrow.[10]

Much if not most of the difficulty is attributable to a widespread failure to go beyond general, unelaborated language in this Court's decision in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), and to the fact that the Court has not found an occasion in the intervening nineteen years to reformulate and supplement *Brown Shoe*'s description of the market definition process.[11] The problem is not that the *Brown Shoe* criteria

---

"Opinions on questions of relevant market have been confusing, as market definitions have varied from broad to narrow, seemingly with no logical consistency. The case law's haphazard delineations of markets and submarkets have failed to provide an analytically sound framework upon which firms can rely in planning mergers and other business strategies."

[10] *E.g.*, *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) (Treble damages for attempting to monopolize a market consisting of retail photoprocessing available through drive-thru kiosks, excluding retail photoprocessing available through any other outlets, such as drugstores, supermarkets, etc.); *Agrashell, Inc.* v. *Hammons Products Co.*, 479 F.2d 269 (8th Cir.) *cert. denied*, 414 U.S. 1032 (1973) (Jury verdict of treble damages for attempting to monopolize the market for making soft grit abrasive (SGA) out of black walnut and apricot pit shells, excluding SGA made from other materials, such as sawdust, rice hulls, corn cobs and clover seeds. The Court of Appeals reversed for failure to prove a dangerous probability of achieving a monopoly but did not reject the market definition); *United States* v. *Blue Bell, Inc.*, 395 F. Supp. 538, 542-51 (M.D. Tenn. 1975) (The relevant product market is the sale of work clothes to industrial rental laundries that rent the work clothes to industries and are unaffiliated with a manufacturer of work clothes and does not include sales directly to industries or sales to industrial rental laundries that are affiliated with a manufacturer of work clothes.)

[11] The Court in *Brown Shoe* held:

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes

are wrong or that *Brown Shoe* was not a useful advance. The criteria are all relevant. Rather, the basic problem is that *Brown Shoe*'s undifferentiated listing of criteria does not provide adequate or proper guidance to a fact-finder, especially in jury cases.

This case, involving jury instructions that did little more than track *Brown Shoe*'s language, is an appropriate and timely opportunity for this Court to help rationalize the process of market definition. These instructions are not atypical. The problems they raise are serious and will continue unless addressed. These very instructions (and functionally similar ones) have been reproduced in the ABA's collection of sample jury instructions for antitrust cases.[12]

Moreover, the issues raised by the instructions in this case, while basic, are relatively simple and can be determined without this Court's having to resolve any factual disputes. They relate to the adequacy of the jury instruc-

---

for it.[42] However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. . . . The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in *any* line of commerce' (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition." 370 U.S. at 325 (citations omitted).

---

[42] The cross-elasticity of production facilities may also be an important factor in defining a product market. . . .

[12] ABA ANTITRUST SECTION, ANTITRUST CIVIL JURY INSTRUCTIONS 127 (1980).

tions themselves, not to the sufficiency of the evidence. The issues are three-fold:

1. Jury instructions that simply recite *Brown Shoe*'s list of factors relevant to market definition—with no explanation as to their meaning or relative significance and no guidance as to how they are to be applied—are legally insufficient.

2. Juries should not be told that market definition can be arrived at by merely counting the factors pointing toward or against a separate market. The basic issues in product market definition are user substitutability (do buyers consider the products close substitutes) and supplier substitutability (can suppliers produce the products interchangeably). Other "relevant factors" are simply evidence on these two basic issues, and their significance varies considerably.

3. An instruction that merely tells the jury that either a "market" or a "submarket" may be the relevant market is inadequate and misleading. The relevance of the "market/submarket" distinction made in *Brown Shoe* needs at least to be more precisely defined. While a case may indeed involve more than one relevant market, there cannot ordinarily be both a clearly defined market and an "economically significant submarket" *within* that market. If buyer or supplier substitutability indicates strongly that products A and B are in the same market, market shares derived from an A "submarket" or a B "submarket" will at best greatly misstate the competitive significance of a merger or other conduct and may be virtually meaningless.[13]

---

[13] The shares of the "submarket" will overstate the significance of, say, a merger between two firms that produce only product A (or B), since competition from producers of B (or A) is totally disregarded. The "submarket" shares will understate the significance of a merger between an A producer and a B producer, as the share of each will be zero in the other "submarket," implying no horizontal merger effects at all.

A. The Jury Instructions in This Case, Which Did Little More Than Track the Language in *Brown Shoe Co.* v. *United States*, Were Insufficient and Misleading.

The underlying market definition question raised at the trial was whether the relevant market should be narrowly defined as the installation of avionics in G-II aircraft models only, or more broadly defined as the outfitting of turbine-powered business aircraft generally. The central issue was supplier substitutability—whether or not established outfitters can easily shift from one aircraft model to another. It may be assumed that user substitutability was not a significant issue—the owner of a G-II aircraft needs an avionics and interior configuration suitable to a G-II. Nevertheless, as many cases and commentators have recognized, lack of user substitutability does not dictate separate markets if the products are produced by common facilities and the producers can and do readily shift their resources from one product to the other in response to changing demands.[14]

Defendants below introduced evidence that in the outfitting industry the technology, facilities, basic tools and skills, avionics and other materials used in outfitting various turbine-powered business aircraft are the same; and that most of the established outfitters hold themselves out as being able to outfit a variety of aircraft, do in fact outfit a variety of aircraft, and readily move from one type to another.[15] Plaintiff company is among

---

[14] *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 510 (1948); *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir.), *cert. denied*, 429 U.S. 940 (1976); *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975); *Telex Corp.* v. *IBM Corp.*, 510 F.2d 894, 914-19 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); *In re Budd Co.*, 86 F.T.C. 518 (1975). *See* P. AREEDA & D. TURNER, II ANTITRUST LAW ¶ 526 (1978); R. POSNER, ANTITRUST LAW, 127-29 (1976).

[15] 624 F.2d at 1349, n.11; App. A at 10a-11a; CA App. 1486-88, 1502-03, 1724-43, 1848-50, 3467.

those, and testimony from some of the Plaintiffs' own witnesses supported the proposition that the business is broader than the outfitting of any one model.[16] Plaintiff, on the other hand, introduced evidence that shifting to a G-II installation involves start-up costs in procuring the necessary Supplemental Type Certificates[17] and in surmounting the "learning curve," and that outfitters tend to specialize in a particular aircraft type at any given time.[18]

Page moved for a directed verdict on the market issue. That motion denied, Page sought market definition instructions that would relate the law to the facts at issue in the case. Page particularly sought such an instruction with regard to the central issue in the case —whether outfitters, because of their ability to shift from one aircraft to another, should be deemed to be in a market of outfitting turbine-powered business aircraft generally. Instead, the District Court, in its charge to the jury on the market definition issue, simply stated Plaintiffs' and Defendants' conflicting definitions of the relevant market, listed the *Brown Shoe* criteria, and added the following:

> "No one factor is necessarily decisive, but the more of these criteria that the particular relevant market fulfills, the more likely it is a separate product/service market.

---

[16] CA App. 110-11, 686-90, 698, 725-26, 1110-11.

[17] These certificates warrant that the avionics installation in a particular plane meets Federal Aviation Administration standards.

[18] The evidence cited by the Court of Appeals that it took "up to $3,000,000 and two and one-half years to enter the G-II avionics installation market," 624 F.2d at 1349, n.11; App. A at 10a-11a, plainly referred to the cost of creating a complete new facility, not the cost of switching existing facilities from the outfitting of other aircraft to the outfitting of G-II's. CA App. at 36-37, 1008-10.

> For the purpose of this case, it is immaterial whether you find from a preponderance of the evidence that the relevant market is a market or a submarket. The relevant market may be either a market or a submarket." 624 F.2d at 1349, n.12; App. A at 11a-12a.

The District Court rejected Page's objections to this charge, including the objection that it was "wholly meaningless and confusing in that it fails to define the considerations which go into determining the relevant market in any way which may be understood by the jury." CA App. at 2573.

On appeal, in addition to arguing that there should have been a directed verdict on the market issue, Page again urged that the charge to the jury was insufficient and misleading. In upholding the jury verdict, the Court of Appeals disposed of Page's objections as follows:

> "We think there was ample evidence of high entry barriers and of the difficulty outfitters encountered in switching back and forth from one model of aircraft to the next to allow the jury to find a relatively narrow market. The court's charge on this issue was clear and spelled out the relevant factors for the jury to consider, and we therefore hold that the jury's factual finding regarding Associated's claim is supported by the evidence." 624 F.2d at 1349-50; App. A at 10a-12a (footnotes omitted).

But the instructions were neither "clear" nor correct on the crucial issue of the weight to be given the various "relevant factors" and the factual evidence bearing on them. Under the charge given it, the jury could have believed Page's evidence showing that outfitters could and did move easily from one aircraft model to another, rather than the evidence cited by the Court, and still have found a narrow G-II market on the basis of "the product's and/or services peculiar characteristics and uses," "distinct prices," and "distinct customers"—either

under the misleading instruction that "the more of these criteria that the particular relevant market fulfills, the more likely it is a separate . . . market," or in the belief, which the instructions did not dispel, that even though outfitter mobility clearly pointed to a general outfitting market, other criteria could be taken as indicating a relevant "submarket." [19]

Thus, this case squarely raises the basic market definition issues set forth above:

First, Brown Shoe's list of "practical indicia" is not and did not purport to be a self-contained blueprint for correct market definition analysis. A mere list of "indicia" does not tell a lay jury—typically unfamiliar with the legal and economic concepts involved—how those indicia are to be applied or put together. (Nor indeed does it adequately explain to a lower court how to define markets in cases tried without a jury.) On its face, a charge that simply tracks *Brown Shoe* is legally inadequate.

Second, Brown Shoe's "indicia" are of varying importance. The basic determinants of a product market are user substitutability and supplier substitutability. Products or services belong in the same market where either (1) buyers consider them to be close substitutes (reasonable interchangeability in use), or (2) suppliers can and do readily shift their productive resources from one product or service to the other in response to changing demands (reasonable interchangeability of productive

---

[19] Because there was no way of knowing whether the jury resolved the disputed evidence on supply substitutability in the manner cited by the Court of Appeals or whether it arrived at its narrow market definition on legally erroneous grounds, the Court of Appeals should have remanded for proper instructions. *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962); *Maryland* v. *Baldwin*, 112 U.S. 490, 493 (1884).

resources). In either event, the various suppliers are in effective competition with each other, and hence are comparable alternatives to whom buyers may turn. All other "indicia" are simply evidentiary with respect to those basic determinants, and the proper weight to be given them varies widely. "Sensitivity to price changes" deserves heavy weight; such evidence strongly suggests either easy buyer or easy supplier substitutability. On the other hand, such factors as "distinct prices," "industry or public recognition . . . as a separate economic entity," or "specialized vendors," are much less significant, and useful only where more decisive indicators are equivocal. Consequently, it is a critical error—too easily inferred from *Brown Shoe*—to instruct a jury, as the trial court in this case did, that "the more of these criteria that a particular relevant market fulfills, the more likely it is a separate product/service market."

Third, *Brown Shoe*'s "market"/"submarket" distinction is confusing and potentially misleading—the very term "submarket" suggests something less than a market. Whenever lack of buyer and supplier substitutability clearly indicates that two products are in separate markets, there is no meaningful "broad market" encompassing both. On the other hand, whenever buyer and/or supplier substitutability point clearly to a market including two or more products, that is the relevant market and there is no "economically significant submarket" consisting of one product alone.[20] There seems little

---

[20] Professor Posner makes precisely these points:

> "The 'submarket' approach is unsound. If the 'outer boundaries' of the market include only the product's good substitutes in both consumption and production—which seems a fair reading of *Brown Shoe*'s reformulation of the cellophane test—then a submarket would be a group of sellers from which sellers of good substitutes in consumption or production had been excluded, and these exclusions would deprive any market-share statistics of their economic significance."

R. POSNER, ANTITRUST LAW 129 (1976).

doubt that misapplication of the market/submarket distinction has made a significant contribution to the dubious market definitions that have littered the antitrust landscape over the past nineteen years.

B. The Issues Raised Are Important and Should Be Resolved by This Court.

The market definition issues raised by this case are of pervasive importance. Market shares are the basis for presumptive liability in virtually all merger cases. The reasonableness of those rules hinges on sensible market definition. If markets are ill-defined, market shares lose whatever significance they would otherwise have. An innocuous merger may be struck down; a potentially harmful merger may escape.

Similarly, proper market definition is critical in Sherman Act cases where proof of competitive injury is required either to protect possibly beneficial conduct [21] or simply to screen out cases of no competitive significance. For example, as discussed in Point II below, most courts have concluded that it is inappropriate to assimilate business torts into antitrust law, and accordingly that Sherman Act treble damages should not be awarded for business torts unless substantial injury to competition is shown. The latter cannot be determined without defining the market. Vague or loose market instructions, permitting the finding of unduly narrow markets, undercut the screening function that a substantial injury requirement is designed to perform.

As we stated at the outset, the approach to market definition reflected in the jury charge in this case is no aberration. The basic errors we have described are com-

---

[21] *E.g., Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

mon, and correcting them would be a long and much needed step toward clarifying a muddled area of antitrust law in both jury and non-jury cases. Particulars in the application of correct basic principles would remain to be resolved, but at least the lower courts would be put on the right course.[22]

II. THE FIFTH CIRCUIT HAS ADOPTED A UNIQUE TEST FOR DETERMINING WHEN ACTS OF UNFAIR COMPETITION VIOLATE THE ANTITRUST LAWS—A TEST THAT CONFLICTS WITH THE TESTS PREVAILING IN OTHER CIRCUITS AND THAT SHOULD BE REJECTED BEFORE MORE BUSINESS RIVALS ARE ENCOURAGED TO SEEK TREBLE DAMAGES FOR ORDINARY BUSINESS TORTS

In upholding the jury instructions on liability, the Fifth Circuit has adopted a test under which simple business torts may constitute antitrust violations whenever they hold some potential for injuring competition, whether or not actual injury to competition is shown. This new test is a significant departure from the more demanding standard of actual competitive injury being adopted by most of the circuits. Because the decision in this case will encourage more disgruntled business rivals to use the antitrust laws to get treble damages and attorney's fees for ordinary business torts, this Court should address the question promptly and resolve the conflict.

Despite this Court's time-honored admonition that the antitrust laws are not designed to remedy injuries from

---

[22] Because the market definition issues raised by this case are of such importance to governmental as well as private enforcement of the antitrust laws, the Court, if it grants this petition, may wish to invite the Solicitor General to present the views of the United States.

all business torts,[23] a small but influential line of cases developed under which a conspiracy to eliminate a competitor by unfair means was treated as a *per se* violation of Section 1 of the Sherman Act.[24] Under this doctrine, frequently referred to as the *Pick-Barth per se* rule, the courts focus on the intent and conduct of the defendants and the injury to the plaintiff; there is no concern with the effect on competition.

---

[23] *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945) ("[The Sherman Act] does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce."); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 512 (1940) ("[T]he Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to 'monopolize the supply, control its price, or discriminate between its would-be purchasers.' ")

[24] The doctrine originated in *Albert Pick-Barth Co.* v. *Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932) (Plaintiff claimed that the defendant corporation conspired with plaintiff's employees to deprive plaintiff of its business by soliciting plaintiff's employees and misappropriating customer lists and cost records. The First Circuit affirmed the plaintiff's judgment, holding that "[t]o constitute an offense under [S]ection 1 of the Sherman Act, it is not necessary, if a conspiracy is proven, the purposes and intent of which was to eliminate by unfair means a competitor in interstate trade, to show that the public was affected, and to what extent." 57 F.2d at 102.) Subsequently, the same court in *Atlantic Heel Co.* v. *Allied Heel Co.*, 284 F.2d 879 (1st Cir. 1960), characterized similar, albeit more extreme, methods of unfair competition as a *per se* violation of the Act. A *Pick-Barth* type of action was also recognized by the Tenth Circuit in *Perryton Wholesale, Inc.* v. *Pioneer Distrib. Co.*, 353 F.2d 618 (10th Cir. 1965), *cert. denied*, 383 U.S. 945 (1966). *See also Metal Lubricants Co.* v. *Engineered Lubricants Co.*, 411 F.2d 426, 431 (8th Cir. 1969); *Mr. Hanger, Inc.* v. *Rizzuto*, 410 F. Supp. 1158 (S.D.N.Y. 1975); *Tower Tire and Auto Center, Inc.* v. *Atlantic Richfield Co.*, 392 F. Supp. 1098 (S.D. Tex. 1975). Some courts extended the doctrine to find *per se* violations when the conspiracy was only to injure, but not to eliminate, a competitor. *C. Albert Sauter Co.* v. *Richard S. Sauter Co.*, 368 F. Supp. 501 (E.D. Pa. 1973).

More recently, the courts have begun to recognize that the aims of the antitrust laws are different from and frequently antithetical to the aims of the laws against unfair competition. While the antitrust laws are concerned with adverse effects on competition, unfair competition laws are largely concerned with protecting the private interests of individual competitors. Acts of unfair competition do not necessarily affect market competition adversely; indeed, such acts are often pro-competitive. *Cf. Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964).[25] Because *per se* rules of illegality are appropriate only when "they relate to conduct that is manifestly anticompetitive," *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977), and because acts of unfair competition do not fit in that category, most of the circuits, including the Fifth Circuit, have been rejecting the *Pick-Barth per se* rule of illegality for acts of unfair competition.[26] Even the progenitor of the *Pick-Barth* line of cases, the First Circuit, has rejected the *per se* rule, at least insofar as

---

[25] The conflict is particularly clear in the frequent cases involving employees who break off to form a new competing company. They may take customer lists and trade secrets with them, or in other respects attempt to profit from their former association. However distasteful such conduct may be from the perspective of tort law, antitrust purposes are served by the creation of a new or more effective competitor.

[26] *See Franklin Music Co.* v. *ABC, Inc.*, 616 F.2d 528, 541-42 (3d Cir. 1979), as amended Dec. 28, 1979, Jan. 8 and 9, 1980; *Northwest Power Products, Inc.* v. *Omark Industries, Inc.*, 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *Juneau Square Corp.* v. *First Wisconsin National Bank of Milwaukee*, 624 F.2d 798 (7th Cir.), *cert. denied*, 49 U.S.L.W. 3409 (Dec. 1, 1980) (No. 80-517); *Havoco of America, Ltd.* v. *Shell Oil Co.*, 626 F.2d 549, 555-56 (7th Cir. 1980); *Stifel, Nicolaus & Co.* v. *Dain Kalman & Quail, Inc.*, 578 F.2d 1256 (8th Cir. 1978); *cf. Kaplan* v. *Burroughs Corp.*, 611 F.2d 286 (9th Cir. 1979), 1980-1 Trade Cases ¶ 63,028 (9th Cir. 1979); *Gough* v. *Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979).

it stands for the broad proposition that unfair competitive practices accompanied by an intent to hurt or eliminate a competitor constitute *per se* violations of the antitrust laws. An adverse effect on competition must be shown.[27] Similarly, the Tenth Circuit has qualified the support it appeared to give the *Pick-Barth* doctrine in 1965 in the *Perryton* case.[28]

Thus, the circuits that have considered the question are generally agreed that "bad acts" and evil intent by the defendant and resultant pecuniary injury to the plaintiff are not enough to sustain antitrust liability; the impact on competition must also be considered.[29]

---

[27] *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 559-62 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

[28] *Craig* v. *Sun Oil Co.*, 515 F.2d 221, 223-24 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 (1976) ("Reference is made in the *Perryton* opinion to existing competition, and it is not necessarily a per se case despite the citation of the First Circuit cases."). The Fourth and Sixth Circuits apparently have not faced the issue. The Second Circuit has also not addressed the issue, but several of the district courts in the circuit have and almost every such instance reveals at least a distaste for the *Pick-Barth* rule. *See Frederick Chusid & Co.* v. *Marshall Leeman & Co.*, 326 F. Supp. 1043 (S.D.N.Y. 1971); *Vogue Instrument Corp.* v. *Lem Instruments Corp.*, 40 F.R.D. 497 (S.D.N.Y. 1966); *cf. Mr. Hanger, Inc.* v. *Rizzuto*, 410 F. Supp. 1158 (S.D.N.Y. 1975).

[29] The literature is in total accord; the *Pick-Barth* rule has been severely criticized. *See* Yoerg, *Should A Trade Secrets Misappropriation Claim Lie in the Procrustean Antitrust Bed?*, 22 ANTITRUST BULL. 1 (1977); Hutter, *"Dirty Tricks"* and *Section One of the Sherman Act: Federalizing State Unfair Competition Law*, 18 B.C. INDUS. AND COM. L. REV. 239 (1977); Boone, *Single-Corporation Competitive Torts and the Sherman Act*, 2 GA. L. REV. 372 (1968); Note, 42 FORD. L. REV. 909 (1974); Note, *Unfair Competition Under the Sherman Act*, 59 IOWA L. REV. 1194 (1974); P. AREEDA & D. TURNER, III ANTITRUST LAW § 828b (1978). One author has even advocated that some business torts be considered *per se* legal insofar as antitrust law is concerned. Note, "Antitrust Treatment of Competitive Torts: An Argument for a Rule of Per Se Legality Under the Sherman Act," 58 TEXAS L. REV. 415 (1980).

The conflict arises because the courts do not agree on what that impact should be. Most of the circuits require an actual adverse impact on competition, usually a "substantially adverse" impact.[30] The Fifth Circuit, however, now imposes treble damage liability for unfair acts that simply have a potential for anticompetitive effects.

The leniency of the Fifth Circuit's standard can be seen in both the jury charge it explicitly approved and the new test it announced. The charge to the jury in this case defined unreasonable restraints of trade as conduct which "tends" to restrict competition. The trial court added that "you need not find a specific injury, but you must find that the conduct tends or is reasonably calculated to prejudice the public interest."[31] More-

---

[30] *Juneau Square Corp.* v. *First Wisconsin National Bank of Milwaukee, supra,* 624 F.2d at 811 ("The Sherman Act requires more than mere injury to a competitor. Plaintiffs must show also that the 'effect upon competition in the marketplace is substantially adverse.' "); *Franklin Music Co.* v. *ABC, Inc., supra,* 616 F.2d at 541 (Plaintiff must show "a substantial impact on or restraint of trade affecting competition in a product market."); *Kaplan* v. *Burroughs Corp., supra,* 611 F.2d at 291 ("[T]he primary considerations in determining whether a restraint of trade is unreasonable are whether the intent of the restraint is anticompetitive and whether the restraint itself has significant anticompetitive effects."); *Craig* v. *Sun Oil Co., supra,* 515 F.2d at 224 ("[The defendants' conduct] had no impact on the competitive situation, and was not actionable under the antitrust theory of plaintiff's case."); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc., supra,* 508 F.2d at 562 ("While the relevant market for purposes of section 2 is not necessarily that for purposes of section 1, there still must be some consideration of the effect of a defendant's conduct on some significant part of the market. There is no evidence [in the present case] whatever of harm to general competition in the market.").

[31] The entire instruction may be found at 624 F.2d at 1353, n.20; App. A at 20a.

over, despite Petitioners' requests that it do so, the Court did not instruct the jury to find whether the various alleged instances of improper conduct adversely affected competition. Rather, the jury was simply told that each of the alleged bad acts, if it occurred, would be evidence supporting Respondent's Sherman Act claims. In short, the jury charge required at most only a finding that Petitioners' conduct *tended* to injure competition, and taken as a whole may not have required even that.[32]

On appeal, the Court below responded as follows to Petitioners' objections to the jury charge:

> "Defendants complain about the court's charge to the jury, contending that it failed adequately to instruct them on the necessity of finding injury to competition. We believe the charge, some of which is set out in the margin, when viewed in its entirety was adequate to withstand a challenge under *Northwest Power* [*Products, Inc.* v. *Omark Industries, Inc.*]." 624 F.2d at 1353; App. A at 20a.

Earlier in its opinion, the Court had read *Northwest Power* as setting forth a two-part test under which a jury can find a defendant liable under Sherman Act § 1 for acts of unfair competition if plaintiff shows "(1) a market effect that would be prohibited under the law of mergers; and (2) other conduct by defendant that threatens Sherman Act values." *Id.* at 1351; App. A at 16a. Thus, the Fifth Circuit will find liability if it finds that the defendant could not lawfully have acquired the plaintiff and that defendant's conduct "threatens" Sherman Act values, whether or not the "threat" results in an actual diminution of competition.

---

[32] Under the broad "public interest" standard of the judge's charge, plaintiff's counsel was permitted to argue that "[i]t is in the public interest to have a marketplace that is not loaded down with bribery" and was able continuously to refer to Petitioners as "The Corrupters." CA App. at 1900-1903.

This test falls far short of the requirement of actual (and usually substantial) injury that other circuits have adopted. The first part incorporates the standards of antimerger law. The legality of a merger turns on an "incipiency" test; proof of actual anticompetitive effects is not required.[33] And some of the judicially formulated rules under the law of mergers permit findings of illegality not on the basis that the particular merger in question would be likely to have any significant ill effects, but rather on the basis that an accumulation of mergers of that magnitude would lead to a substantial lessening of competition.[34] Similarly, the "tends to" language of the jury charge and the "threatens" language of the second part of the test contemplate only incipient not actual harm to competition.[35]

A probability of adverse competitive consequences may be a sufficient basis for an antitrust court to enjoin a defendant from engaging in some kinds of business torts in some kinds of circumstances. But it is a totally inappropriate test for awarding an aggrieved competitor

---

[33] *Brown Shoe Co., Inc.* v. *United States, supra,* 370 U.S. at 318, n.32 and 323 (". . . § 7 of the Clayton Act was intended to reach *incipient* monopolies and trade restraints . . ." and "Congress used the words '*may be* substantially to lessen competition', to indicate that its concern was with *probabilities,* not certainties." (Footnotes omitted and emphasis added.)).

[34] *See, e.g., United States* v. *Von's Grocery Co.,* 384 U.S. 270, 278 (1966); *Brown Shoe Co., Inc.* v. *United States, supra,* 370 U.S. at 343-44.

[35] Actually it is difficult to imagine circumstances in which business torts directed against a competitor would add to the market effect of acquiring that competitor. Even if the torts eliminate the victim, the competitive effect is no worse than merger and may well be less, because the perpetrator does not acquire the good-will or going concern values that merger would have yielded.

A merger test may be a useful *threshold* test in a variety of business torts cases, leading to the dismissal of cases in which

triple the amount of damages suffered from lost business. Aggrieved competitors should get damages only for injuries causally related to acts that *actually* injure competition, not from acts that *might* injure competition.[36]

There is no need to belabor the obvious fact that the difference between the "tendency" test of the Fifth Circuit and the actual impact test of the other circuits is more than a semantic quibble. Many decisions of this Court comparing Sherman Act and Clayton Act tests have stressed the difference.[37] It is perhaps noteworthy, however, that plaintiff in the present case appears to be the only party ever to prevail in an antitrust damage action for acts of unfair competition where the test was not *per se* illegality.[38]

---

merger would have been lawful. But to find *liability* for business torts because a merger would be unlawful on "incipiency" grounds is quite another matter.

[36] This Court has recently made the point, emphasizing the difference between the prophylactic nature of the anti-merger laws and the remedial nature of the treble-damage provisions. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977).

[37] *See, e.g., Brown Shoe Co.* v. *United States, supra*, 370 U.S. at 317-18, n.32; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 312-13 (1949).

[38] The conflict is not mooted by the fact that the Court below, having approved the jury charge under its potentiality test, cited evidence which in its view permitted an inference of actual competitive injury. Since the jury was given a "tendency" charge, the Court of Appeals could have accepted the verdict despite the instruction only if the evidence of actual injury to competition were so clear that a reasonable jury could not find otherwise. That was not the case and the Court did not so hold. On the contrary, there was no adverse change in market structure after the alleged bad acts and there was overwhelming evidence in the record, including testimony of Associated's own officers, that the alleged market remained intensely competitive. CA App. at 104-105. Moreover, the Court's reliance on a comparison of prices and profits on transactions before and after the challenged conduct was erroneous

The Fifth Circuit has been an influential force in the movement toward rejecting the *Pick-Barth* rule. Its articulation of a new test to replace the *per se* rule is likely to be influential as well. This Court should correct the inappropriate use of incipiency tests in unfair competition actions before more time and money is wasted litigating garden-variety business torts in federal courts under the antitrust laws.

III. THE COURT, IF IT GRANTS THIS PETITION, SHOULD ALSO CORRECT THE PLAIN ERROR COMMITTED BY THE COURT BELOW IN UPHOLDING THE VERDICT OF LIABILITY UNDER SECTION 2 OF THE SHERMAN ACT

The Court below held that no one of the alleged instances of improper conduct, standing alone, could support liability under Section 2 of the Sherman Act. Only "taken together" could these acts support the jury's verdict.[39] The Court, however, overlooked the fact that the jury was not so instructed. The jury was simply told that each of the alleged instances was "evidence supporting plaintiffs' antitrust claims." 624 F.2d at 1359, n. 27; App. A at 31a. Thus, the jury could have easily predicated liability on a finding that only one or two instances of improper conduct occurred. Since the jury was not asked to indicate its findings with respect to the

---

for reasons that need not be spelled out here but were elaborated upon in the petition for rehearing below.

[39] "Probably no one of the instances of improper conduct, standing alone, would lead to section 2 liability. Taken together, however, they show a pattern of exclusionary behavior sufficient to support the jury's verdict." 624 F.2d at 1356; App. A at 25a.

Later in the opinion the Court was more categorical, holding: "We reiterate that *all* of this conduct, taken together, rose to the level of a section 2 violation and that isolated acts, standing alone, did not." *Id.* at 1363; App. A at 41a (emphasis in original).

individual acts but was asked only conclusory questions as to ultimate liability, one cannot tell on what basis the jury found liability.[40] Accordingly, a remand was plainly required.[41] *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962); *Maryland* v. *Baldwin*, 112 U.S. 490, 493 (1884).

Where, as here, the evidence necessary to convert garden-variety business torts into an antitrust violation is so thin and a jury disposition to condemn so likely, courts must be particularly attentive to the distinction between sufficiency of the evidence and adequacy of instruction. Assuming that the Court of Appeals was correct in finding that the evidence, if construed in a particular way, was sufficient to support liability under Section 2, the Court could affirm only if it also found that the jury was so instructed. This condition was not met.[42]

---

[40] Petitioners had tried to avoid this problem by proposing specific interrogatories addressed to the occurrence *vel non* of each alleged bad act. CA App. at 2472-2497.

[41] The evidence on each of the alleged "bad acts" was highly controverted; one cannot say as a matter of law that the jury must have found enough "bad acts" to satisfy the test of the Court of Appeals.

[42] The Court of Appeals made the same error in upholding the jury's market definition, *see supra* at 15-16. It also made a similar error in affirming liability under Section 1 on the ground, *inter alia*, that acquisition by Page of Associated's San Antonio operation would have violated Clayton Act § 7. That issue was never even raised at trial, let alone put to the jury, and Petitioners were therefore deprived of the opportunity to present evidence on various issues relevant to a Section 7 "potential competition" case, the theory on which the Court of Appeals relied. *See* 624 F.2d at 1351-52; App. A at 16a-18a.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DONALD F. TURNER
RONALD J. GREENE
SUSAN LOW BLOCH

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Attorneys for Page Airways, Inc. and Page Gulfstream, Inc.

JAY M. VOGELSON
One Dallas Center, Suite 2400
Dallas, Texas 75201

Attorney for Douglas Juston

D. L. CASE
JACK PEW, JR.
4300 First National Bank Bldg.
Dallas, Texas 75202

Attorneys for Ross C. Chapin

Of Counsel:

AKIN, GUMP, HAUER & FELD
2800 Republic National
Bank Bldg.
Dallas, Texas 75201

February 2, 1981